QUESTIONS PRESENTED

1. Whether the burden of proof in this suppression action rested upon petitioner, the movant, to show that Treasury agents obtained his books and records by misrepresentation.

2. Whether the Treasury agents were required to give petitioner the full *Miranda* warnings of his constitutional rights as soon as criminal prosecution became a possibility, even though he was not in custody or deprived of his freedom of action in any significant way.

3. Whether Treasury agents have a duty to warn a taxpayer that their investigation into his civil tax liability has taken on criminal aspects.

4. Whether the decision below rests upon an unwarranted rejection of the district court's findings of fact.

5. Whether under 18 U.S.C. 3731 the court of appeals had jurisdiction of this appeal where the required certification was not signed by the United States attorney for the particular district, but by the duly authorized subordinate of the Assistant Attorney General in Washington under whose supervision the case was being handled.

STATUTE INVOLVED

18 U.S.C. (Supp. V) 3731:

> An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:
>
> * * *
>
> From an order, granting a motion for return of seized property or a motion to suppress evi-

dence, made before the trial of a person charged with a violation of any law of the United States, if the United States attorney certifies to the judge who granted such motion that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of the charge pending against the defendant.

STATEMENT

Petitioner is under indictment for wilfully attempting to evade substantial individual income tax for the years 1960, 1961 and 1962, in violation of Section 7201 of the Internal Revenue Code (App. 8–10).[1] Before trial, he moved to suppress documentary evidence (consisting of his books and records of income and expenses) alleging that the Treasury agents obtained such evidence from him in violation of the Fourth, Fifth and Sixth Amendments to the Constitution (App. 11–17). After an evidentiary hearing the district court issued a Memorandum Opinion and Order (App. 18–25; Pet. A1–A7) suppressing all evidence received by the agents from petitioner or his accountant, and all evidence obtained through leads from such evidence.[2] The court of appeals reversed.

The district court's findings of fact may be summarized as follows:

Petitioner is a lawyer of wide reputation, with considerable expertise in criminal cases, who has resided

[1] References to the Appendix in the court below will be designated "App."

[2] The district court had earlier denied the motion to suppress after hearing the testimony of petitioner and his accountant (App. 5).

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The agents never replied specifically that "fraud" or a "crime" was involved, but stated that "their function was to reconcile the large discrepancies, to see if they were the result of innocent errors." (Pet. App. A3.)

On the basis of these findings, the district judge concluded that the actions of the agents amounted to "affirmative fraud, trickery and deceit." (Pet. App. A4.) He ordered all evidence received by the agents from petitioner or his accountant, and all evidence obtained through leads from such evidence to be suppressed, including even the evidence originally obtained by the Revenue Agent before entry of the Special Agent into the investigation. (Pet. App. A6–A7.)

The government appealed under 18 U.S.C. 3731, arguing that the findings of fact were insufficient to support the district court's ultimate conclusion that suppression was called for and that that conclusion was clearly erroneous as a matter of law. The court of appeals agreed.

ARGUMENT

1. Petitioner attacks the court of appeals' holding that he had the burden of showing the agents obtained the books and records by misrepresentation. Of course, the burden of establishing that evidence should be suppressed rests upon the defendant. Petitioner relies, however, on the principle that when the defendant shows that a search and seizure did take place and that it was otherwise unlawful, the burden shifts to the government if it wishes to show that the search was justified by the defendant's consent. *Bumper v. North Carolina*, 391 U.S. 543. The underlying as-

sumption is that "'invitations' to enter one's house, extended to armed officers of the law who demand entrance, are usually * * * invitations secured by force," *Judd* v. *United States*, 190 F. 2d 649, 651 (C.A. D.C.); the facts of such cases are likely to be "instinct with coercion." *Bumper* v. *North Carolina*, *supra*, 391 U.S. at 550.

In this case, however, there was nothing inherently coercive about the agents' request to be allowed to examine the books and records, and the privacy of the home was not involved. Petitioner's only basis for transforming what occurred into a search and seizure is that the agents misled him into believing this was an ordinary civil tax investigation. And the court of appeals correctly required petitioner to prove this claim, thus considering the case analogous to the usual situation where the defendant has the burden of showing that an otherwise unlawful search and seizure took place. See *Grant* v. *United States*, 291 F. 2d 227, 229 (C.A. 2), vacated on another ground, 369 U.S. 401; *United States* v. *Haden*, 397 F. 2d 460, 465 (C.A. 7); *United States* v. *Pate*, 324 F. 2d 934, 935 (C.A. 7); *United States* v. *Remolif*, 227 F. Supp. 420, 423 (D. Nev.); *United States* v. *Neves*, 269 F. Supp. 158, 161 (S.D. N.Y.). See also, *Prudden* v. *United States*, certiorari denied October 12, 1970, No. 453, this Term.

2. Since petitioner was neither in custody, nor otherwise deprived of his freedom in any significant way, at the time he turned over the records, the constitutional requirements of *Miranda* v. *Arizona*, 384 U.S. 436, did not apply. *Morgan* v. *United States*, 377 F. 2d 507, 508 (C.A. 1); *United States* v. *White*, 417

F. 2d 89 (C.A. 2), certiorari denied, 397 U.S. 912; *United States* v. *Jaskiewicz* (No. 18,387, C.A. 3), decided September 28, 1970; *United States* v. *Mancuso*, 378 F. 2d 612, 619 (C.A. 4), certiorari denied, 390 U.S. 955; *Agoranos* v. *United States*, 409 F. 2d 833, 835 (C.A. 5), certiorari denied, 396 U.S. 824; *United States* v. *Miriani*, 422 F. 2d 150, 153–154 (C.A. 6), certiorari denied, 399 U.S. 910; *Cohen* v. *United States*, 405 F. 2d 34 (C.A. 8); certiorari denied, 394 U.S. 943; *Feichtmeir* v. *United States*, 389 F. 2d 498 (C.A. 9); *Hensley* v. *United States*, 406 F. 2d 481, 484 (C.A. 10). Petitioner contends that these decisions, including the holding in this case, are in conflict with *United States* v. *Dickerson*, 413 F. 2d 1111, 1117 (C.A. 7), a prosecution for wilful failure to file income tax returns, where the court held prospectively that *Miranda* warnings must be given "at the inception of the first contact with the taxpayer after the case has been transferred to the Intelligence Division."

In view of the prospective nature of the *Dickerson* holding in 1969 (after the evidence was turned over in this case) and the present policy of the Internal Revenue Service to give the equivalent of virtually full *Miranda* warnings to all taxpayers when they are first interviewed by a special agent,[3] there should be

[3] By news release dated November 26, 1968, the Internal Revenue Service announced that henceforth a special agent on his first visit to a taxpayer must warn him of his constitutional rights, including the right to counsel, but not including the proffer of legal aid unless the taxpayer is in custody. The news release notes that this "new procedure goes beyond most legal requirements that are designed to advise persons of their rights." 1968 CCH Fed. Tax Reporter, par. 6946; 1968 Prentice-Hall Fed. Taxes, par. 55,476.

few, if any, future cases that would meet a fate different in the Seventh Circuit than in any other circuit. See *e.g.*, *United States* v. *Campione*, 416 F. 2d 486 (C.A. 7), certiorari denied, 397 U.S. 909; *United States* v. *Townsend* (C.A. 7, No. 18,159), decided July 9, 1970, certiorari pending, No. 708, this Term; *United States* v. *Gallagher*, decided July 9, 1970 (C.A. 7, No. 18,000). The conflict, therefore, does not warrant further review by this Court, as the Court has repeatedly recognized in consistent denials of certiorari where a conflict with *Dickerson* has been relied upon.

3. The district court found that petitioner was given no warning when the agents' routine audit disclosed fraud, a disclosure auguring possible criminal prosecution, and petitioner relies on this finding here. But all that is necessary is that the taxpayer be advised that the examining agents are concerned with the accuracy of his returns. See *United States* v. *Sclafani*, 265 F. 2d 408, 414–415 (C.A. 2), certiorari denied, 360 U.S. 918; *United States* v. *Prudden*, 424 F. 2d 1021, 1031–1035 (Pet. A31, A35–A44) (C.A. 5), certiorari denied October 12, 1970, No. 453, this Term; *United States* v. *Frank*, 245 F. 2d 284, 286 (C.A. 3), certiorari denied, 355 U.S. 819; *Turner* v. *United States*, 222 F. 2d 926, 930–932 (C.A. 4), certiorari denied, 350 U.S. 831; *Biggs* v. *United States*, 246 F. 2d 40, 44 (C.A. 6); *Zacher* v. *United States*, 227 F. 2d 219, 225–226 (C.A. 8), certiorari denied, 350 U.S. 993. Inherent in that advice is the warning that the agents will pursue evidence of misreporting without regard to the

shadowy line between avoidance and evasion. *United States* v. *Sclafani, supra,* 265 F.2d at 414–415; *United States* v. *Prudden, supra* (see Pet. App. A39).

The district court also concluded that the agents practiced deceit on petitioner by emphasizing the civil aspects of their investigation and deemphasizing the criminal aspects. But since the agents were not obliged to warn of the possible criminal consequences, and since they answered petitioner's inquiries about the nature of their investigation with the statement that they were trying to reconcile the large discrepancies to see if they were the result of innocent errors (see p. 5, *supra*), the court of appeals correctly held (Pet. App. A13) that there was no material misrepresentation.[1]

4. Petitioner confuses findings of fact with conclusions of law by claiming that the decision below rests upon an unwarranted rejection of the district court's findings of fact. The difficulty was with the legal conclusion to be drawn from those facts and the court of appeals correctly held that the findings were clearly insufficient to support the district judge's ultimate conclusion. The agents never said their investigation could not lead to the bringing of criminal charges; indeed, petitioner was put on notice of just such a possibility when the agents told him they were trying to determine whether the large discrepancies were the result of *innocent* errors.

5. There is nothing to the contention that the court below lacked jurisdiction of this appeal because the

[1] This serves to distinguish *Gouled* v. *United States*, 255 U.S. 298, on which petitioner relies (Pet. 20).

certification required by 18 U.S.C. 3731 was not signed by the United States Attorney. An attorney of the Tax Division working under the supervision of the Assistant Attorney General for that division handled this case from the outset, the United States Attorney having asked to be relieved of responsibility for trial. In these circumstances, the requirement of 18 U.S.C. 3731 that the certification be signed by the "United States attorney" must mean the attorney for the United States who is responsible for the case; the purpose of the certification is to assure that the government attorney in charge is not appealing in order to delay proceedings.

Under the relevant statutes and regulations[5] the Attorney General had authority to relieve the United States Attorney of responsibility for the case, as he requested, and to place full responsibility for its conduct in the hands of other Department of Justice at-

[5] Section 510 of Title 28 provides that the Attorney General may make appropriate provisions to authorize the performance by any other officer, employee or agency of the Department of Justice of any function of the Attorney General. Section 506 provides that the "President shall appoint, by and with the advice and consent of the Senate, nine Assistant Attorneys General, who shall assist the Attorney General in the performance of his duties." Here the certification was signed in the name of the Assistant Attorney General in charge of the Tax Division by his duly designated subordinate. 28 CFR 0.70 places in that Assistant Attorney General (subject to the general supervision of the Attorney General) the responsibility for, *inter alia*, conducting, handling, or supervising "Criminal proceedings arising under the internal revenue laws" (with exceptions not here relevant) and appellate proceedings in connection with such criminal proceedings.

torneys, working under the supervision of the Assistant Attorney General in charge of the Tax Division. For purposes of this case, that Assistant Attorney General is the "United States attorney" and it was therefore proper that his name be signed to the certificate by a properly designated subordinate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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